BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFF D. CRISWELL Claimant	)	
VS.	)	Docket No. 1,036,248
U.S.D. 497 Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the January 22, 2010, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 21, 2010. James L. Wisler, of Lawrence, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for the self insured respondent.

The Administrative Law Judge (ALJ) found that claimant had a 12.5 functional whole body impairment. Further, the ALJ found that claimant was entitled to a work disability and that claimant had a 33 percent task loss. The ALJ computed claimant's wage loss to be 40 percent until February 4, 2009, and 55 percent thereafter. He calculated claimant's work disability to be 36.5 percent until February 4, 2009, and 44 percent thereafter. Last, the ALJ found that claimant is entitled to future medical care upon application and review and appointed Dr. Michael Lange to provide ongoing medical care to claimant in the form of pain management and provision of appropriate medications.

The Board has considered the record and adopted the stipulations listed in the Award.[1]

ISSUES

Respondent requests review of the ALJ's findings regarding the nature and extent of claimant's disability. Specifically, respondent seeks review of whether claimant is

[1] The Award incorrectly listed the date of the deposition of Jeff D. Criswell as being taken on June 12, 2009. The deposition was taken May 28, 2009.

entitled to a work disability when he was terminated by respondent for misconduct; whether the ALJ erred in awarding a work disability to claimant from the date of the accident to the date of his termination on February 4, 2009; whether claimant suffered permanent impairment from this accident; whether respondent is entitled to a credit for claimant's preexisting impairment; whether the ALJ correctly calculated claimant's post-injury average weekly wage; and whether the ALJ erred in appointing Dr. Lange to be claimant's authorized treating physician for pain management and provision of medication.

Claimant argues that he sustained personal injury by accident that arose out of and in the course of his employment and has a 7 percent functional disability; that he is entitled to a work disability; that he is entitled to medical treatment of his back, neck and legs; and that he is entitled to unauthorized medical treatment to the statutory limit.

The issues for the Board's review are:

(1) Is claimant entitled to a work disability if he was terminated for cause from a job that paid more than 90 percent of his preinjury average weekly wage?

(2) Did the ALJ err in awarding claimant a work disability for the period from the date of accident to February 4, 2009, during which claimant continued to work for respondent earning the same or more than his pre-injury average weekly wage?

(3) Did claimant suffer a permanent impairment of function from this accident?

(4) Is respondent entitled to a credit for claimant's preexisting permanent impairment?

(5) What is claimant's task loss?

(6) Did the ALJ err in calculating claimant's post-injury wages and percentage of wage loss?

(7) Did the ALJ exceed his jurisdiction in appointing Dr. Lange to be claimant's authorized treating physician for pain management and provision of medication?

FINDINGS OF FACT

Claimant was employed by respondent as a head custodian at Hillcrest Elementary School (Hillcrest). On June 8, 2007, he injured his back while moving furniture. He was unable to finish the work day and went home. At some point, he went to the emergency room at Lawrence Memorial Hospital, where he was given pain medication and was sent to Occupational Health. Respondent appointed Dr. Chris Fevurly to be claimant's authorized treating physician, and claimant was treated with medication and physical therapy.

(1) Is claimant entitled to a work disability if he was terminated for cause from a job that paid more than 90 percent of his preinjury average weekly wage?

Claimant was terminated from his job at respondent on February 4, 2009. Claimant said a ninth grade Central student had asked if he was going to get her anything for her birthday, and he said he would because she was a good student. Claimant testified that the student told him he could put her gift in her locker. All custodians have a master key for the lockers. He bought the student a balloon and a dozen roses and placed them in the student's locker.

Robert Arevalo, respondent's Division Director of Human Resources, testified that after an investigation, claimant was terminated for using poor judgment, improperly entering and searching a student's locker, and giving a student a gift. Mr. Arevalo testified that the school handbook provides for progressive corrective action that first calls for a verbal warning, then a written warning, and then termination. He admitted that claimant had been given no verbal or written warnings before his termination.

Claimant said he did not believe that it was in any way unprofessional or not conducive to an effective educational environment for him to give the student the gift. He testified he did not enter the student's locker to search the property. Claimant also stated that respondent's policy does not say that giving gifts is prohibited, only discouraged.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall

> not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[2] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

Claimant suffered injury to his back, which is a nonscheduled injury. Therefore, claimant's permanent partial disability is covered by K.S.A. 44-510e. The plain and unambiguous language of K.S.A. 44-510e(a) provides that permanent partial disability (work disability) is the average of claimant's percentage of task loss and his percentage of wage loss and in no event shall this percentage be less than the percentage of functional impairment. The statute neither provides for a good faith test, nor does it require that the wage loss be directly attributable to the injury. So long as claimant is not engaging in work for wages equal to 90 percent or more of his preinjury average weekly wage, claimant is eligible for permanent partial disability compensation based on his work disability. The reason for claimant's termination from employment by respondent is not relevant to the determination of the nature and extent of claimant's disability. The statute does not provide for imputing a wage to claimant based upon his ability to earn wages or otherwise.

(2) Did the ALJ err in awarding claimant a work disability for the period from the date of accident to February 4, 2009, during which claimant continued to work for respondent earning the same or more than his pre-injury average weekly wage?

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[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

Claimant continued working at respondent after his accident. After about a month, respondent moved him to an accommodated job in the blueprint room in the maintenance shed. In December 2007 or January 2008, claimant was transferred from Hillcrest, where he had worked as head custodian, to Central Junior High School (Central), where he worked as a general custodian. His wages and fringe benefits remained the same as when he worked at Hillcrest until his termination on February 4, 2009.

As set forth above, K.S.A. 44-510e(a) provides in relevant part that "[a]n employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." Claimant continued to work for respondent and earned at least 90 percent of his preinjury average weekly wage until he was terminated on February 4, 2009. Therefore, claimant's percentage of permanent partial disability compensation is limited to his percentage of functional impairment during this time period. Beginning on February 5, 2009, claimant would be entitled to an award based on his percentage of work disability.

(3) Did claimant suffer a permanent impairment of function from this accident?

Claimant had previously injured his back and was treated by Dr. Michael Lange. He returned and saw Dr. Lange's partner in July 2007. Claimant told Dr. Lange's partner that he had re-aggravated his back in June 2007. Dr. Lange's partner gave claimant two epidural injections. He also referred claimant to physical therapy and prescribed medication. Dr. Lange testified that throughout his treatment, claimant had nine epidural injections and also has had referrals to physical therapy. The epidural injections have only given claimant short term relief. Claimant has been seen by a spine surgeon and a rheumatologist. Dr. Lange said that in the future, claimant would need more physical therapy. If he continues to have pain, he will need pain medicine and possibly occasional epidural injections. The worst case scenario would be either spinal fusion surgery or a spinal cord stimulator. Dr. Lange believes that claimant's condition is stable and does not believe that claimant will get significantly better.

Dr. David Ebelke, a board certified orthopedic surgeon who specializes in treatment of the spine, evaluated claimant at the request of respondent on November 13, 2007. He took a history, reviewed medical records, reviewed copies of some diagnostic films, and performed a physical examination of claimant. Dr. Ebelke did not have any records from claimant's back problems in 2005. Claimant denied previous back problems, but Dr. Ebelke noted that he had been treated by Dr. Chris Penn for low back pain in 2005. Claimant said his biggest complaints in November 2007 were low back pain and pain in both hips.

Dr. Ebelke's review of claimant's diagnostic testing showed that he had a disc bulge at the L4-5 level. It was Dr. Ebelke's opinion that it was highly unlikely that disc bulge was caused by the accident at work because the medical records indicated claimant had a previous MRI that showed he had a moderate disc bulge before this accident. The previous MRI, however, was not available to Dr. Ebelke at the time of the examination.

Dr. Ebelke said he found signs of symptom magnification in his examination of claimant. He said claimant complained of rather severe pain at the examination, but he did not look like he was in pain. Although claimant complains he has more pain now than before, Dr. Ebelke had to take this in context with everything else. He found no evidence of any permanent injury. Based on the AMA *Guides*,[3] Dr. Ebelke rated claimant as having a 0 percent impairment as a result of the accident. Dr. Ebelke said claimant did not need restrictions, but he suggested a common sense guideline of a maximum lift in the 35 to 50 pound range.

Dr. Lowry Jones, Jr., a board certified orthopedic surgeon, examined claimant on May 15, 2008, at the request of claimant's attorney. Dr. Jones said that claimant had evidence of degenerative disk disease with a bulging disk at L4-5 and evidence of a strain/sprain of his lower back. Claimant told Dr. Jones that he has pain that goes down both his legs occasionally. He also complained of upper back pain. Claimant was still receiving treatment, but Dr. Jones believed he was at maximum medical improvement. He did not think claimant was a surgical candidate.

Dr. Jones said that claimant had two distinct injuries: the injury in 2005 and the injury in 2007. He stated further that he thought claimant's current problems were related to both injuries. He said claimant definitely had preexisting disease process, a preexisting degenerative disk, and a preexisting bulging disk. But according to the medical records, claimant was relatively asymptomatic following treatment in 2005. He believed claimant's injury in 2007 significantly aggravated his preexisting problems. Dr. Jones reviewed the MRI films taken both in 2005 and 2008 and did not see a significant difference between them, but claimant's pain was significantly worse after the June 2007 accident.

Dr. Jones found no evidence that claimant had any gross neurologic loss. He did not find that claimant had foot drop or significant weakness in either leg. Dr. Jones said claimant did not have any sort of nerve impingement active when he saw him. His impression was that claimant's condition was primarily associated with his underlying degenerative disk disease and bulging disk at L4-5, and that all preexisted the 2007 accident.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based on the AMA *Guides*, Dr. Jones rated claimant as having a 10 percent impairment to his lumbar spine and a 5 percent impairment to his cervicothoracic spine for spasm, which combine for a 15 percent permanent partial impairment to the whole body. Dr. Jones, however, apportioned 10 percent of that impairment to claimant's preexisting disease and found that claimant had a 5 percent impairment caused by the 2007 injury. Dr. Jones recommended that claimant limit repetitive bending at the waist, particularly lifting below the knee level. He believed claimant would be able to lift 30 to 40 pounds at the waist to shoulder level.

Dr. Joseph Huston examined claimant on September 18, 2009, at the request of the ALJ. He reviewed claimant's medical records, took a history, and performed a physical examination, after which he diagnosed claimant with low back pain with left lower extremity radiculopathy symptoms. He noted that claimant has a bulging disc at L4-5 that preexisted the June 2007 work accident, but claimant is worse following the June 2007 accident. Dr. Huston found claimant to be in the AMA *Guides* diagnosis related estimate Lumbosacral Category III and had a 10 percent permanent partial impairment to the whole body. Dr. Huston opined that 3 percent of this disability preexisted claimant's work-related accident, and 7 percent was a result of the work injury of June 8, 2007. Dr. Huston believed that further medical treatment would be mainly for pain control, primarily with oral medication but possibly with lumbar epidural steroid injections.

The Board finds the testimony of Dr. Jones persuasive. As such, claimant has a 15 percent impairment of function, of which 5 percent is new and attributable to this accident.

(4) Is respondent entitled to a credit for claimant's preexisting permanent impairment?

Claimant stated that he fell in either 2004 or 2005, after which he suffered some back pain. He said he spent six to eight weeks in physical therapy and was fine thereafter until his June 2007 accident.

Dr. Michael Lange is board certified in anesthesia with additional certification in pain management. He first saw claimant in August 2006 for back pain that radiated into both sides of his buttocks. At that time, he evaluated claimant and sent him to physical therapy. He did not see claimant again until after his work-related accident.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[4] The test is not whether the accident causes the condition, but whether the accident aggravates or

[4] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.[5] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[6]

K.S.A. 2009 Supp. 44-501(c) states in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Based upon the apportionment opinion of Dr. Jones, the Board finds respondent is entitled to a 10 percent credit for preexisting impairment out of his total functional impairment of 15 percent.

(5) What is claimant's task loss?

Richard Santner, a vocational rehabilitation counselor, met with claimant on February 25, 2009, at the request of claimant's attorney. He prepared a list of 42 tasks that claimant performed in the 15-year period before claimant's work-related injury. The only physician to give a task loss opinion was Dr. Jones, who opined that of the 42 tasks on Mr. Santner's list, claimant would be unable to perform 14, for a 33 percent task loss.

The Board finds claimant has lost the ability to perform 33 percent of the work tasks that he performed during the 15 years before the accident.

(6) Did the ALJ err in calculating claimant's post-injury wages and percentage of wage loss?

Claimant had no wage loss until his termination by respondent on February 4, 2009. After his termination, claimant's wage loss was initially 100 percent. Claimant applied for jobs and, on approximately March 15, 2009, began delivering newspapers as an independent contractor. He earned approximately $252 per week throwing papers, but he had to deduct his expenses. He testified that a box of bags cost $25, and he usually purchased two boxes every other week. He also testified that his fuel costs were $80 per week. Subtracting his expenses from his earnings would compute to an average weekly wage of $147. When compared to his preinjury gross average weekly wage of $665.79, which includes the value of fringe benefits, claimant's wage loss during this period of employment was 78 percent.

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[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[6] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

Claimant worked as an independent contractor delivering newspapers until August 5, 2009, when he began working as a floor tech for Brandon Woods at Alvamar (Brandon Woods). Teresa Prochaska, the Human Resources Director at Brandon Woods, testified that claimant earned $9 per hour and was hired to work 40 hours per week. Further, Brandon Woods pays $287.26 per month towards his personal health insurance, which computes to $66.29 per week. Claimant testified, however, that he often did not work 40 hours per week. A wage statement from Brandon Woods shows that from October 12, 2009, through November 10, 2009, a period of 4.57 weeks, claimant worked 151.75 regular hours and .33 overtime hours. Claimant continues to work for Brandon Woods.

Respondent argues that because K.S.A. 44-510e(a) uses the term "average weekly wage" for both preinjury and post injury earnings, claimant's average weekly wage should be computed using the same method post injury as is used to compute the preinjury average weekly wage. For this reason, respondent contends claimant's base wage at Brandon Woods is $360 ($9 per hour x 40 hours per week). When insurance and overtime is included in this figure, claimant's gross average weekly wage would be $427.27 in this job. Conversely, claimant contends that the Court of Appeals in *Nistler*[7] held that only the actual earnings can be considered for the post injury wage. As such, by dividing claimant's total regular hours of 151.75 by the 4.57 weeks worked, which results in 33.21 hours per week, times $9 per hour, equals a base wage of $298.89 and a gross weekly wage of $366.13 and a wage loss of 45 percent. The Board finds that although respondent makes a persuasive argument that the Board should follow the language of the statute, nevertheless the court's holding in *Nistler* requires that we use the actual hours claimant worked and not impute a 40 hour work week.

The Board has concerns with the Court of Appeals decision in *Nistler*. It is difficult to make sense of portions of the decision. After quoting portions of K.S.A. 44-510e(a), the court stated:

> The above-excerpts from 44-510e(a) make it clear that permanent partial disability has two components: functional disability and wage loss. In this appeal, Nistler's functional disability equal to an 82.8% task loss is not in issue. Likewise, his average weekly wage of $652.42 on the date of the injury is not disputed. What is in dispute is how to calculate Nistler's average weekly wage after the injury.[8]

K.S.A. 44-510e(a) does make clear that permanent partial disability has two components, but it is not "functional disability and wage loss." Rather, it is functional impairment and work disability. And work disability has two components: wage loss and task loss. Furthermore, functional disability is not the equivalent of task loss, and Nistler had neither

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[7] *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

[8] *Nistler*, 40 Kan. App. 2d at 837.

an 82.8 percent functional disability nor an 82.8 percent functional impairment.[9] Also, although the court in *Nistler* was asked to and did interpret the phrase "engaging in any work for wages,"[10] the court nevertheless framed the issue as "how to calculate Nistler's average weekly wage after the injury."[11] The Board agrees with respondent's argument that these are separate concepts. Average weekly wage is a term of art defined by the Workers Compensation Act in K.S.A. 44-511, whereas "wages" is not. Respondent argues that *Nistler* should be interpreted as construing the phrase "engaging in any work for wages" and not "average weekly wage" or "average gross weekly wage." Unfortunately, the Court of Appeals failed to make this distinction.

The Court of Appeals expressly stated that the provisions of K.S.A. 44-511 are not applicable to the calculation of the post-injury wage. It went on to say the statute was inapplicable to the calculation of the post-accident average weekly wage. The Court of Appeals expressly held that it was their "conclusion that it is irrelevant whether Nistler was a part-time or full-time employee in determining his post-injury wage."[12] (But then went on to discuss the issue and hold that there was substantial competent evidence Nistler was a full-time employee under the first alternative definition in 44-511(a)(5) but not under the second.) The Court of Appeals then concluded:

> The Board erred in applying K.S.A. 2005 Supp. 44-511(a)(4) and (5), together with K.S.A. 2005 Supp. 44-511(b)(4), to determine Nistler's post-injury average weekly wage. Under K.S.A. 44-510e Nistler's actual wages should be used to determine his post-injury average weekly wage. Although we generally agree with the ALJ's general approach to determine Nistler's post-injury wage, a remand is necessary because the initial award does not provide sufficient facts to support the ALJ's finding of a 17.6% wage loss.
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> We do not presume to give further direction to the Board as to what formula or guidelines should be followed to determine Nistler's actual post-injury wage. The appropriate method should be left to the Board, whose members have the expertise and experience to formulate a sound approach. The Board's order is reversed, and the cause is remanded for further proceedings to determine Nistler's post-injury average weekly wage, his resulting wage loss, and permanent partial disability benefits.

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[9] The Board's determination was that Nistler had an 82.8 percent task loss and a 10 percent impairment of function. *Nistler v. Footlocker Retail, Inc.*, No. 1,024,626, 2007 WL 2586175 (Kan. WCAB August 30, 2007).

[10] *Nistler*, 40 Kan. App. 2d at 837.

[11] *Nistler*, 40 Kan. App. 2d at 837.

[12] *Nistler*, 40 Kan. App. 2d at 840.

Until or unless the Court of Appeal's decision in *Nistler* is overturned or limited to only the phrase "engaging in any work for wages," the Board is constrained by the doctrine of *stare decisis* to follow the holding in *Nistler*. As such, the provisions of K.S.A. 44-511 will not be utilized to determine claimant's post-injury average weekly wage.

(7) Did the ALJ exceed his jurisdiction in appointing Dr. Lange to be claimant's authorized treating physician for pain management and provision of medication?

After he was released from treatment by his authorized workers compensation physicians, claimant saw Dr. Lange on his own, and his treatment was covered by his personal health insurance. Respondent has not authorized Dr. Lange to provide any care or treatment to claimant. Although respondent argues that Dr. Fevurly is still claimant's authorized treating physician, the fact is that Dr. Fevurly found claimant to be at maximum medical improvement and released him from treatment. Dr. Fevurly did not offer to continue providing pain management or continue monitoring claimant's prescriptions.

K.S.A. 2009 Supp. 44-510h states in part:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> (b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

K.S.A. 44-510j(h) states in part:

> If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee

> may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

The Board finds that claimant was without an authorized treating physician once he was released by Dr. Fevurly. As such, the change of physician statute, K.S.A. 44-510h(b)(1) does not apply. The ALJ was within his jurisdiction to determine that claimant was in need of ongoing medical treatment and to designate a physician to provide that treatment. Furthermore, the physician appointed by the ALJ to perform an independent medical examination, Dr. Huston, was the last physician in this record to examine claimant. He believed claimant would require further medical treatment for pain control. The Board agrees that an order for ongoing medical treatment is appropriate.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Director for approval.

CONCLUSION

(1) A termination from employment by the employer for cause or due to the employee's misconduct does not preclude a work disability.

(2) Permanent partial disability is limited to the percentage of functional impairment when the claimant is earning 90 percent or more of his preinjury average weekly wage.

(3)(4) Claimant's percentage of functional impairment is 15 percent. He suffered a 5 percent permanent impairment of function from this accident over and above the 10 percent which was preexisting and for which respondent is entitled to a credit against the permanent partial disability award.

(5) Claimant's task loss is 33 percent.

(6) During the period of June 8, 2007, through February 4, 2009, claimant's wage loss was 0 percent, and claimant is limited to his percentage of functional impairment. From February 5, 2009, through March 14, 2009, claimant's wage loss was 100 percent. When averaged with his 33 percent task loss, claimant's work disability is 66.5 percent. Beginning March 15, 2009, through August 4, 2009, claimant's wage loss was 78 percent and his work disability was 55.5 percent. From August 5, 2009, forward, claimant's wage loss is 45 percent and his work disability is 39 percent. Each of these permanent partial disability percentages will be reduced by claimant's preexisting 10 percent functional impairment.

(7) The ALJ did not exceed his jurisdiction in appointing Dr. Lange to be claimant's authorized treating physician.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 22, 2010, is modified to find that for the period of June 8, 2007, through February 4, 2009, claimant is limited to his functional impairment of 15 percent, less 10 percent preexisting impairment, for a permanent partial disability of 5 percent. For the period of February 5, 2009, through March 14, 2009, claimant is entitled to a work disability of 66.5 percent, less 10 percent preexisting impairment, for a permanent partial disability of 56.5 percent. For the period of March 15, 2009, through August 4, 2009, claimant is entitled to a work disability of 55.5 percent, less 10 percent preexisting impairment, for a permanent partial disability of 45.5 percent. For the period of August 5, 2009, forward, claimant is entitled to a work disability of 39 percent, less 10 percent preexisting impairment, for a permanent partial disability of 29 percent.

Claimant is entitled to 6.14 weeks of temporary total disability compensation at the rate of $332.74 per week or $2,043.02, followed by 20.75 weeks of permanent partial disability compensation at the rate of $332.74 per week or $6,904.36 for a 5 percent functional impairment, followed by 5.43 weeks of permanent partial disability compensation at the rate of $443.88 per week or $2,410.27 for a 56.5 percent work disability, followed by 20.43 weeks of permanent partial disability compensation at the rate of $443.88 per week or $9,068.47 for a 45.50 percent work disability, followed by 73.74 weeks of permanent partial disability compensation at the rate of $443.88 per week or $32,731.71 for a 29 percent work disability, making a total award of $53,157.83.

As of May 26, 2010, there would be due and owing to the claimant 6.14 weeks of temporary total disability compensation at the rate of $332.74 per week in the sum of $2,043.02 plus 20.75 weeks of permanent partial disability compensation at the rate of $332.74 per week in the sum of $6,904.36 plus 68 weeks of permanent partial disability compensation at the rate of $443.88 per week in the sum of $30,183.84 for a total due and owing of $39,131.22, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $14,026.61 shall be paid at the rate of $443.88 per week for 31.60 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge